Supreme Court, U.S.
FILED
DEC 22 1999
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No. 99-747

IN THE
Supreme Court of the United States

HAROLD LEWIS,
Petitioner
v.
KMART CORPORATION,
Respondent

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* FOR THE NATIONAL ALLIANCE FOR THE MENTALLY ILL AND THE AMERICAN ASSOCIATION OF RETIRED PERSONS SUPPORTING THE PETITIONER

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WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

27 pp

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In the Supreme Court of the United States

OCTOBER TERM, 1999

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Petition for a Writ of Certiorari
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BRIEF *AMICI CURIAE*
FOR THE NATIONAL ALLIANCE FOR THE MENTALLY ILL AND THE AMERICAN ASSOCIATION OF RETIRED PERSONS SUPPORTING THE PETITIONER

INTEREST OF AMICI[1]

The National Alliance for the Mentally Ill (NAMI) is the nation's leading grassroots advocacy organization solely dedicated to improving the lives of persons with severe mental illnesses. NAMI has more than 185,000 members and 1,200 state and local affiliates in all 50 states, the District of Columbia, Puerto Rico, and Canada. NAMI's efforts focus on support to persons with severe mental illnesses and their

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[1] *Amici* certify that no one other than am*ici* contributed to the writing of this brief. Both Petitioner and Respondent have consented to the filing of this brief.

families; advocacy for nondiscriminatory and equitable federal, state, and private-sector policies; research into the causes, symptoms and treatments for brain disorders; and education to eliminate the pervasive stigma towards severe mental illnesses. An important aspect of NAMI's mission is to advocate for fair and non-discriminatory long-term disability insurance benefits for people with severe mental illnesses.

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed, and many of those rely on their employers for the provision of all their benefits, including long-term disability insurance. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985, filed more than 180 *amicus* briefs before this court and the federal appellate and district courts.

STATEMENT OF THE CASE

Harold Lewis worked for more than ten years for the Kmart Corporation. During the course of his employment, he purchased a long-term disability policy available to Kmart employees to create security for himself and his family should he become severely disabled and unable to work. Mr. Lewis paid the total costs of the premiums for this policy. Although he has suffered since 1979 from major depression, a biologically based brain disorder, his condition was sufficiently stable to enable him to work for many years in managerial level positions for Kmart.

In 1995, Mr. Lewis' major depression worsened and he was forced to take leave from his work. He was deemed to be totally disabled within the meaning of his long-term disability policy, and commenced receiving benefits under this policy in September, 1995. He was subsequently informed that conditions classified as "mental and nervous" under the plan were subject to a 24 month cap, and his benefits would therefore be terminated in September, 1997. Conditions classified as "physical" under the plan were not subject to any cap on benefits, and individuals deemed to qualify for long-term disability benefits based on physical disabilities were therefore eligible to receive benefits through age 65. In August, 1997, Mr. Lewis filed suit in the United States District Court for the Eastern District of Virginia, alleging that Kmart had violated Title I of the Americans with Disabilities Act (ADA).[2]

At trial, Kmart offered no evidence, actuarial or otherwise, to justify the 24 month cap on benefits for people who suffer from "mental/nervous" conditions. In contrast, Mr. Lewis provided abundant evidence to support his position that no justifiable basis exists for imposing 24 month caps on long-term disability benefits for persons with mental disabilities. Thus, the district court entered judgement in favor of Mr. Lewis.[3] However, the U.S. Court of Appeals for the Fourth Circuit reversed, holding that Title I of the ADA does not protect people with mental disabilities from limitations in employer provided long-term disability benefits which are not imposed on other recipients of those benefits.[4] In so doing, the

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[2] Mr. Lewis also filed a claim under Title III of the ADA against the insurance provider, Aetna Life Insurance Company, but this claim was later dismissed on statute of limitations grounds.

[3] *Lewis v. Kmart*, 7 F. Supp. 2d 743 (E.D.Va. 1998).

[4] *Lewis v. Kmart*, No. 98-2179 (4th Cir., 1999).

court, in effect, held that employers and insurance companies do not have to provide actuarial or other justification for policies that single out discreet groups of people with disabilities for lower levels of coverage in long-term disability benefits.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision misinterprets the intent and plain meaning of the ADA, as well as applicable case-law. If allowed to stand, its decision will permit insurers to continue unabated a pattern of discrimination against persons with mental disabilities in long-term disability policies, despite the absence of actuarial, medical or other evidence to justify this practice. The Fourth Circuit's decision is entirely inconsistent with the spirit and purpose of the ADA, enacted to prevent indefensible discrimination against persons with disabilities based on nothing more than historical prejudice and stigma. This is precisely the type of discrimination that is present in this case. There has been considerable confusion and disagreement among lower federal courts about how the ADA applies to the imposition of arbitrary caps on benefits for specific conditions in long-term disability policies. The Court's review is therefore needed to provide a clear framework for adjudicating cases such as this one.

I. THE FOURTH CIRCUIT'S RULING BELOW WAS INCORRECT AS A MATTER OF LAW BECAUSE THE COURT IMPROPERLY RELIED UPON *TRAYNOR v. TURNAGE*, 485 U.S. 535 (1988).

The Fourth Circuit based its decision on its belief that the ADA does not prohibit one disability group from receiving preferential treatment over another disability group. It cited this Court's opinion in *Traynor v. Turnage*, 485 U.S. 535

(1988), in support of this proposition. Amici assert that the Fourth Circuit misconstrued the *Traynor* decision.

Traynor, a case which predated the ADA and was decided under its more narrow precursor, the Rehabilitation Act of 1973,[5] analyzed a challenge to a distinction among veterans receiving certain educational benefits from the federal government. Under a provision enacted by Congress -- not one imposed by a private company-- veterans were permitted to use their benefits for up to ten years from their discharge date.[6] Those veterans who delayed their education because of "a physical or mental disability which was not the result of [their]own willful misconduct" were granted an extension for using the benefits. As a result of the exclusion of individuals who were disabled because of "willful misconduct", individuals diagnosed with "primary alcoholism" were denied the extension.

The distinction was allowed because the veterans denied the extension "are not . . . denied benefits solely by reason of [their] handicap, but because they engaged with some degree of willfulness in the conduct that caused them to become disabled." Id. at 1383. No such basis exists here for excluding Mr. Lewis from receiving his long-term disability benefits. Indeed, the *Traynor* Court cautioned that "[i]t would arguably be inconsistent with § 501 for *Congress* to distinguish between categories of disabled veterans *according to generalized determinations that lack any substantial basis.*"

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[5] In *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), this Court noted that the ADA's anti-discrimination prohibitions are broader than those contained in Section 504 of the Rehabilitation Act of 1973. Id. at 2186,2187.

[6] Unlike the distinction challenged in this case, the provision analyzed in Traynor was part of a law enacted by Congress. "Accordingly, since we are not at liberty to pick and choose among congressional enactments . . . when two statutes are capable of co-existence," the challenged provision was upheld. 108 S. Ct. at 1383-84.

Id. at 1383(emphasis added). See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312.[7]

In *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), this Court last year strongly suggested that *Traynor* should not be interpreted to prevent an individual or a group of individuals within a protected class from asserting an ADA discrimination claim because there were denied benefits available to other members of the protected class. In *Olmstead*, two institutionalized individuals with mental disabilities argued that Title II of the ADA required the state of Georgia to provide them with community placements. The State argued that disparate treatment among members of the same protected class is not actionable under the ADA. This Court rejected that view, asserting that the position stated in the dissent that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of the same group,"...."is incorrect as a matter of precedent and logic." Id. at 2186, n.10.

II. THE DECISION BELOW IMPROPERLY INTERPRETED THE PLAIN MEANING AND LEGISLATIVE HISTORY OF TITLE I AND TITLE V OF THE ADA.

At trial, respondent Kmart offered no evidence of actuarial data or experience in defense of its disability-based limitation in Harold Lewis' long-term disability policy. Despite this, the Fourth Circuit, disregarding the statutory language of the ADA and its legislative history, held that this limitation did not violate Title I of the ADA. By so doing, the

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[7] "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." Id. at 312. (Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq.).

Court failed to recognize that limitations of this sort, when not supported by actuarial data or other experience based evidence, are precisely what the ADA is intended to eliminate.

The plain language and legislative history of the ADA prohibit unjustified discrimination in employer-provided long-term disability insurance policies. Title I of the ADA prohibits employers from discriminating against employees on the basis of disability "in regard to . . . employee compensation, . . . and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a).

Title V, section 501 (the "safe harbor" provision) of the ADA establishes that actuarial justification is required for disability-based limitations in employer-provided insurance policies. This provision delineates the circumstances under which employers may lawfully provide insurance plans that include disability-based distinctions which would otherwise violate the provisions of Title I. Employers are not prohibited from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan *that are based on underwriting risks,* classifying risks, or administering such risks that are based on or not inconsistent with State law," provided that the employer is not engaging in "a subterfuge to evade the purposes of Title I..." 42 U.S.C. § 12201(c)(emphasis added). Thus, under this rule, a disability-based plan term in an employer-provided long-term disability insurance plan must be based on underwriting risks to avoid running afoul of Title I of the Act.

The basic principle that disability-based distinctions in insurance must be justified through actuarial data or other evidence of legitimate risk assessment is clearly outlined in the reports issued by the committees sponsoring the ADA: "Under the ADA, a person with a disability cannot be denied insurance *or be subject to different terms or conditions of*

insurance based on disability alone, *if the disability does not pose increased risks*." House Comm. on Education and Labor, 101st Cong., 2nd Sess., H.R. Rep. No. 101-485(II), p. 136 (1990)(emphasis added).

The legislative history further specifies that to qualify under the exemption for increased underwriting risk, a plan may not rely on mere *speculation* about risk, but must offer *sound actuarial data or experience*:

> [I]nsurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are *based on sound actuarial data and not on speculation* . . . [The] ADA requires that underwriting and classification of risks be *based on sound actuarial principles or be related to actual or reasonably anticipated experience*.

House Comm. on the Judiciary, 101st Cong., 2nd Sess., H.R. Rep. No. 101-485(III), p. 70-71 (1990)(emphasis added).

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is *based on sound actuarial principles or is related to actual or reasonably anticipated experience*.

House Comm. on Education and Labor, 101st Cong., 2nd Sess., H.R. Rep. No. 101-485(II), p. 136 (1990)(emphasis added).

Clearly, Kmart did not provide the evidence at trial that the ADA requires to justify distinctions in long-term disability benefits for persons with mental disabilities.

III. KMART AND ITS INSURANCE INDUSTRY AMICI PROVIDED NO EVIDENCE TO SUPPORT ITS DISCRIMINATORY LONG-TERM DISABILITY POLICY.

Kmart provided no evidence at trial – actuarial or otherwise – in support of the 24 month cap on mental disability benefits in Harold Lewis' long-term disability policy. In contrast, Mr. Lewis provided compelling evidence that the imposition of these caps is unnecessary, is contrary to prevailing scientific evidence, and is grounded in outdated, prejudicial stereotypes about mental illnesses.

1. It is noteworthy that the only expert actuarial testimony at trial was provided by actuary Arthur Anderson on behalf of petitioner Harold Lewis. Mr. Anderson testified that, in his expert opinion, insufficient data exists for companies like Kmart to conclude that costs would increase if two year caps on mental disabilities were lifted from their long-term disability insurance plans. Joint Transcript at 0506, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999). Mr. Anderson also testified that the Diagnostic and Statistical Manual (DSM) is not used in the actuarial field, and consequently there is no information in that field that could be used to evaluate the risks in long-term disability policies associated with all of the conditions named in the DSM.[8]

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[8] The Diagnostic and Statistical Manual – Fourth Edition (DSM-IV) is used by psychiatrists, psychologists, and other mental health practitioners to diagnose and classify a wide range of mental disorders and mental health conditions. Mr. Lewis' long-term disability policy establishes a 24 month limit on benefits for disabilities "caused to any extend by a mental condition (not including alcoholism or any other substance abuse)

2. There is no scientific evidence to support contentions by the insurance industry that caps in long-term disability benefits for people with mental disabilities are necessary because mental disorders are difficult to evaluate and accurately diagnose.[9] Harold Lewis provided extensive testimony at trial that his condition, major depression, can be diagnosed as accurately as other medical disorders.

John Rush, M.D.,[10] a leading national authority on major depression, testified on behalf of Petitioner Harold Lewis at trial. When asked about the reliability of the diagnosis of depression by a qualified psychiatrist, Dr. Rush stated that "the reliability of DSM-IV major depression is on the order of 80 to 85 percent." Joint Trial Exhibit at 0458, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999). When asked how this compared with the diagnosis of conditions not in the DSM, Dr. Rush responded that they are comparable. He referenced a 1993 report published in the *American Journal of Psychiatry* which, relying on a "huge body of evidence", concluded that major mental disorders "can be reliably diagnosed... ." Id.[11]

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described in the most current edition of the DSM." Joint Transcript at 0071, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999).

[9] *Amicus curiae* brief of the American Council of Life Insurers and The Health Insurance Association of America at 20, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999) ("Because mental disability claims are increasingly common and difficult to evaluate, there is a great risk that they will be abused or over-utilized.")

[10] Dr. Rush served as chair of the workgroup which wrote the section on mood disorders for the fourth edition of the Diagnostic and Statistical Manual (DSM-IV), the authoritative source of diagnostic information for psychiatrists and other mental health professionals throughout the United States.

[11] National Advisory Mental Health Council, "Health Care Reform for Americans with Severe Mental Illnesses", 150 *American Journal of Psychiatry* 10: 1447 (Oct. 1993). See, also, Spitzer, Foreman, and Nee,

Dr. Rush also established in his testimony that major depression can be evaluated and studied through a number of laboratory tests that distinguish the brain functions of depressed individuals from those who do not suffer from depression. These laboratory tests include EEG evaluations, functional brain imaging, structural brain imaging (such as MRIs) and endocrine tests. Joint Trial Exhibit at 0459. As with other medical disorders, e.g. heart disease, cancer, and diabetes, clinical depression is diagnosed through both the observation and evaluation of symptoms and through laboratory tests to detect or rule out secondary medical causes.[12]

3. The insurance industry has also rationalized caps on mental disability benefits as necessary to prevent against abuse and over-utilization. This contention is fallacious because most long-term disability policies, including that of Mr. Lewis, contain a number of safeguards against abuse and over-utilization, including progressively stringent eligibility requirements, precise disability evaluation procedures, and periodic re-evaluation requirements.

Mr. Lewis' long-term disability policy with Aetna stipulates that a policy-holder must be certified by Aetna as being disabled from working before qualifying for payments under the plan. During the first 30 months of a disability period, a person qualifies for payments under the plan only if

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"Field Trials for Initial Inter-Rater Diagnostic Reliability," 136 *American Journal of Psychiatry* 6, 815 (1979).

[12] Dr. Rush explained that depression can sometimes be an early symptom of other medical disorders, such as cancer of the pancreas or other endocrine system disorders. In these cases, as with major depression, the signs and symptoms of depression are attributable to changes or impairments in brain functioning. Joint Appendix at 0449, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999).

the person is evaluated as "not able, solely because of disease or injury, to perform the material duties of your own occupation." Joint Appendix at 0068, *Lewis v. Kmart*, 98-2179 (4th Cir. 1999).

After 30 months, the standard to qualify for continuing payments becomes even stricter. The policy holder must be determined to be "not able solely because of disease or injury, to work at *any* reasonable occupation." Id. (emphasis added).

Moreover, to qualify for long-term disability benefits, the Kmart policy requires a policyholder to be under the care of a physician which, in the case of a person asserting a claim based on a condition covered in the DSM, is a psychiatrist. Id. at 0082. Furthermore, the plan vests authority with the insurer to require applicants to submit to an independent medical examination by a physician of its own choosing. Failure to participate in such an examination is per se grounds for denying certification for benefits. Id. at 0068.

These safeguards clearly place responsibility on policyholders like Mr. Lewis to demonstrate that they are truly disabled from working, and thereby minimize the chances that someone will be found eligible for benefits who is not qualified.

Finally, as an additional safeguard against abuse of long-term disability benefits, Kmart's policy requires beneficiaries to be periodically re-certified to ensure that they still qualify for benefits. Under the terms of the plan, the initial determination of eligibility for benefits need not be for an indefinite time period. Rather, the plan affords Aetna with complete discretion to certify benefits for a fixed period of time only, and to require beneficiaries to be periodically reevaluated for continuing eligibility.

IV. UNJUSTIFIED CAPS IN LONG-TERM DISABILITY BENEFITS FOR MENTAL DISABILITIES ARE BASED ON STIGMA AND PREJUDICE, ARE HARMFUL TO PERSONS WITH MENTAL DISABILITIES AND ARE CONTRARY TO THE PUBLIC INTEREST.

1. The imposition of arbitrary and discriminatory caps on benefits for persons with mental disabilities reflects long-standing stigma and discriminatory attitudes towards people who suffer from these disorders.

Historically, stigma towards those who suffer from serious mental illnesses has been pervasive. For example, it was once thought that mental illness was related to being possessed with demons.[13] While such concepts are no longer prevalent, people suffering from major depression and other mental illnesses are still largely viewed as weak, products of poor upbringing, and responsible for their own plight.

In the past, widespread stigma and misunderstanding towards those with mental illnesses resulted in the subhuman treatment of those who suffered from these disorders.[14] Today, this stigma is manifest in discrimination of a far more subtle form that is nevertheless very damaging to the recovery of people who suffer from these illnesses. People with mental illnesses frequently experience discrimination in all areas of their lives, including housing,[15] employment,[16] voting[17] and insurance.[18]

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[13] *See* O. WAHL, TELLING IS RISKY BUSINESS, 14-15 (In Press); see, also, G.N. GROB, A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL, 10 (1993).

[14] O. Wahl, Id.

[15] S. Page, *Effects of the Mental Illness Label in Attempts to Obtain Accommodation,* 9 CANADIAN JOURNAL OF BEHAVIORAL SCIENCE, 84 (1977).

The devastating and pervasive effects of stigma on the lives of persons with mental illnesses is emphasized in the comprehensive report on mental health and mental illness in America recently released by the Surgeon General of the United States:

> Stigma leads others to avoid living, socializing, or working with, renting to, or employing people with mental disorders ... [i]t reduces patients' access to resources and opportunities, (e.g. housing, jobs) and leads to low self-esteem, isolation, and hopelessness. It deters the public from seeking, and wanting to pay for, care. In its most overt and egregious form, stigma results in outright discrimination and abuse. More tragically, it deprives people of their dignity and interferes with their full participation in society.

U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* at 6 (1999).

Two well-known psychiatrists, Paul Jay Fink and William R. Dubin, have written that scientific advances in

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[16] Office of Technology Assessment, "Psychiatric Disabilities, Employment, and the Americans with Disabilities Act," 8 (1994); ("By disclosing a psychiatric disability, an individual risks discrimination, teasing, or harassment, isolation, stigmatizing assumptions about his or her ability, and the labeling of all behavior and emotions as pathological").

[17] Martha T. Moore, *Maine Initiative Would Give The Vote To All Mentally Ill*, USA TODAY, October 30, 1997.

[18] B. Shannon, *The Brain Gets Sick Too: The Case For Equal Coverage For Serious Mental Illness*, 24 ST. MARY'S L.J. 365, 365-398 (1993); R. Honberg and L.L. Hall, *A Question Of Fairness: Equal Coverage Of Severe Mental Illness In Health Insurance*, 6 DISABILITY LAW REPORTER 1, 12 (November, 1996).

diagnosing and treating mental illnesses have far outdistanced recognition of these illnesses as biological disorders of the brain among the American public:

> There is vast ignorance in the public sector as to the advances that have been made in psychiatry, which in combination with the pervasive stigma would prevent people from seeking and obtaining help. Additionally, the myth that there is something about the American character that says we should have strength to be able to take care of ourselves continues to take precedence over the concept that mental illness is a biological illness which is treatable and not self-induced.

W.R. Dubin and P.J. Fink, *Effects of Stigma on Psychiatric Treatment* in STIGMA AND MENTAL ILLNESS at 4 (P. Fink and A. Tasman, eds., 1992).

Although there are notable exceptions, many employer-provided long-term disability plans impose limitations on benefits for people with mental disabilities that are not imposed on other beneficiaries of these plans.[19] While

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[19] Aetna, the insurance company with whom Kmart contracted for the long-term disability policy in question, provides long-term disability plans with no caps on benefits for persons with mental disabilities to at least two employers with more subscribers than Kmart's plan, one with 80,000 subscribers, the other with 30,000 subscribers. Joint Appendix at 0506, *Lewis v. Kmart*, Id. Additionally, at least two other cases involving challenges brought under the ADA to caps on mental disability benefits in long-term disability policies have been settled after employers agreed to provide uncapped plans. *Leonard F. v. Israel Discount Bank*, Civ. Act. 95-6964 (So. Dist., N.Y., Feb. 17, 1998) (settlement agreement and stipulation of dismissal). See also *Harris v. City of Phoenix*, Civ. Act. 95-0361 (Dist. Ct. Az., May 1, 1996) (consent decree abandoning differential in mental and physical disability benefits).

the insurance industry may claim that these caps are necessary to ensure the financial viability of these plans, to date, to the best of *amici's* knowledge, not one insurance company or employer whose plan has been questioned has provided evidence to substantiate these claims. Limitations on benefits for mental disabilities in these plans can therefore only be based on prejudice and stigma.

2. Discriminatory limits on benefits for persons with mental disabilities impact in a profoundly negative way on the recovery of individuals forced to leave work due to major depression or other serious mental disabilities.[20] This negative impact extends far beyond the devastating economic circumstances for the individual and that person's family. Without a stable stream of income derived from these benefits, individuals may be forced to forego desperately needed care, or they may be forced to seek care from inadequately financed public systems of care.

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[20] Prior to trial, Michael R. Hryvniak, M.D., Mr. Lewis' treating psychiatrist, provided an affidavit in which he spoke of his concerns that the loss of long-term disability benefits would exacerbate his patient's condition. "I would be seriously worried about his state of mind, and possibly his actions, were he to suffer a substantial setback in his ability as, for example, by becoming unable to provide sufficient income for the family to maintain its modest lifestyle." Joint Appendix, Vol. II at 0607, *Lewis v. Kmart,* Id.

CONCLUSION

The Americans with Disabilities Act was enacted to protect people with disabilities from unjustified discrimination. Employers with long-term disability polices containing caps on benefits for persons with mental disabilities and the insurance companies they contract with have never provided justification for these restrictive disability-based limitations. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 1999